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United States Information Agency has designated, through publication by public notice in the FEDERAL REGISTER, as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien will engage during the exchange visitor program; or

(iii) The alien acquires exchange visitor status in order to receive graduate medical education or training in the United States.

(2) For the purposes of this paragraph the terms *financed directly* and *financed indirectly* are defined as set forth in section §514.1 of chapter V.

(3) The country in which 2 years' residence and physical presence will satisfy the requirements of INA 212(e) in the case of an alien determined to be subject to such requirements is the country of which the alien is a national and resident, or, if not a national, a lawful permanent resident (or has status equivalent thereto).

(4) If an alien is subject to the 2-year foreign residence requirement of INA 212(e), the spouse or child of that alien, accompanying or following to join the alien, is also subject to that requirement if admitted to the United States pursuant to INA 101(a) (15) (J) or if status is acquired pursuant to that section after admission.

(d) *Notification to alien concerning 2-year foreign residence requirement.* Before the consular officer issues an exchange visitor visa, the consular officer must inform the alien whether the alien will be subject to the 2-year residence and physical presence requirement of INA 212(e) if admitted to the United States under INA 101(a) (15) (J) and, if so, the country in which 2 years' residence and physical presence will satisfy the requirement.

§41.63 Two-year home-country physical presence requirement.

(a) *Statutory basis for rule.* Section 212(e) of the Immigration and Nationality Act, as amended, provides in substance as follows:

(1) No person admitted under Section 101(a) (15)(J) or acquiring such status after admission:

(i) Whose participation in the program for which he came to the United States was financed in whole or in

part, directly or indirectly, by an agency of the United States Government or by the government of the country of his nationality or of his last legal permanent residence;

(ii) Who at the time of admission or acquisition of status under 101(a)(15)(J) was a national or resident of a country which the Secretary of State of the Department of State, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged [See "Exchange Visitor Skills List", 49 FR 24194, *et seq.* (June 12, 1984) as amended]; or

(iii) Who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until is established that such person has resided and been physically present in the country of his nationality or his last legal permanent residence for an aggregate of at least two years following departure from the United States.

(2) Upon the favorable recommendation of the Secretary of State of the Department of State, pursuant to the request of an interested United States Government agency (or in the case of an alien who is a graduate of a medical school pursuing a program in graduate medical education or training, pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization after the latter has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a legal permanent alien), or that the alien cannot return to the country of his nationality or last legal permanent residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by

the Attorney General to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, the waiver shall be subject to the requirements of section 214(k) of the Immigration and Nationality Act (8 U.S.C. 1184).

(3) Except in the case of an alien who is a graduate of a medical school pursuing a program in graduate medical education or training, the Attorney General, upon the favorable recommendation of the Secretary of State of the Department of State, may also waive such two-year foreign residency requirement in any case in which the foreign country of the alien's nationality or last legal permanent residence has furnished the Secretary of State of the Department of State a statement in writing that it has no objection to such waiver in the case of such alien. Notwithstanding the foregoing, an alien who is a graduate of a medical school pursuing a program in medical education or training may obtain a waiver of such two-year foreign residence requirements if said alien meets the requirements of section 214(k) of the Immigration and Nationality Act (8 U.S.C. 1184) and paragraphs (a) (2) and (e) of this section.

(b) *Request for waiver on the basis of exceptional hardship or probable persecution on account of race, religion, or political opinion.* (1) An exchange visitor who seeks a waiver of the two-year home-country physical presence requirement on the grounds that such requirement would impose exceptional hardship upon the exchange visitor's spouse or child (if such spouse or child is a citizen of the United States or a legal permanent resident alien), or on the grounds that such requirement would subject the exchange visitor to persecution on account of race, religion, or political opinion, shall submit the application for waiver (INS Form I-612) to the District Office of the Immigration and Naturalization Service having administrative jurisdiction over the exchange visitor's place of temporary residence in the United States, or, if the exchange visitor has already departed the United States, to the district Office having administrative jurisdiction over the exchange visitor's

last legal place of residence in the United States.

(2)(i) If the Commissioner of the Immigration and Naturalization Service ("Commissioner") determines that compliance with the two-year home-country physical presence requirement would impose exceptional hardship upon the spouse or child of the exchange visitor, or would subject the exchange visitor to persecution on account of race, religion, or political opinion, the Commissioner shall transmit a copy of his determination together with a summary of the details of the expected hardship or persecution, to the Waiver Review Division, office of Exchange Visitor Program Services, in the Department of State's Office of Bureau of Consular Affairs.

(ii) With respect to those cases in which the Commissioner has determined that compliance with the two-year home-country physical presence requirement would impose exceptional hardship upon the spouse or child of the exchange visitor, the Waiver Review Division shall review the program, policy, and foreign relations aspects of the case, make a recommendation, and forward it to the Commissioner. If it deems it appropriate, the Department of State may request the views of each of the exchange visitors' sponsors concerning the waiver application. Except as set forth in §514.44(f)(4), *infra*, the recommendation of the Waiver Review Division shall constitute the recommendation of the Department of State.

(iii) With respect to those cases in which the Commissioner has determined that compliance with the two-year home-country physical presence requirement would subject the exchange visitor to persecution on account of race, religion, or political opinion, the Waiver Review Division shall review the program, policy, and foreign relations aspects of the case, and after consulting thereon with the Bureau of Human Rights and Humanitarian Affairs of the United States Department of State, make a recommendation, and forward such recommendation to the Commissioner. Except as set forth in §514.44(f)(4), *infra*, the recommendation of the Waiver Review Division shall constitute the

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recommendation of the Department of State and such recommendation shall be forwarded to the Commissioner.

(c) *Requests for waiver made by an interested United States Government Department of State.* (1) A United States Government agency may request a waiver of the two-year home-country physical presence requirement on behalf of an exchange visitor if such exchange visitor is actively and substantially involved in a program or activity sponsored by or of interest to such agency.

(2) A United States Government agency requesting a waiver shall submit its request in writing and fully explain why the grant of such waiver request would be in the public interest and the detrimental effect that would result to the program or activity of interest to the requesting agency if the exchange visitor is unable to continue his or her involvement with the program or activity.

(3) A request by a United States Government agency shall be signed by the head of the agency, or his or her designee, and shall include copies of all IAP-66 forms issued to the exchange visitor, his or her current address, and his or her country of nationality or last legal permanent residence.

(4) A request by a United States Government agency, excepting the Department of Veterans Affairs, on behalf of an exchange visitor who is a foreign medical graduate who entered the United States to pursue graduate medical education or training, and who is willing to provide primary medical care in a designated primary care Health Professional Shortage Area, or a Medically Underserved Area, or psychiatric care in a Mental Health Professional Shortage Area, shall, in addition to the requirements set forth in §514.44(c) (2) and (3), include:

(i) A copy of the employment contract between the foreign medical graduate and the health care facility at which he or she will be employed. Such contract shall specify a term of employment of not less than three years and that the foreign medical graduate is to be employed by the facility for the purpose of providing not less than 40 hours per week of primary medical care, i.e. general or family practice,

general internal medicine, pediatrics, or obstetrics and gynecology, in a designated primary care Health Professional Shortage Area or designated Medically Underserved Area (“MUA”) or psychiatric care in a designated Mental Health Professional Shortage Area. Further, such employment contract shall not include a non-compete clause enforceable against the foreign medical graduate.

(ii) A statement, signed and dated by the head of the health care facility at which the foreign medical graduate will be employed, that the facility is located in an area designated by the Secretary of Health and Human Services as a Medically Underserved Area or Primary Medical Care Health Professional Shortage Area or Mental Health Professional Shortage Area and provides medical care to both Medicaid or Medicare eligible patients and indigent uninsured patients. The statement shall also list the primary care Health Professional Shortage Area, Mental Health Professional Shortage Area, or Medically Underserved Area/Population identifier number of the designation (assigned by the Secretary of Health and Human Services), and shall include the FIPS county code and census tract or block numbering area number (assigned by the Bureau of the Census) or the 9-digit zipcode of the area where the facility is located.

(iii) A statement, signed and dated by the foreign medical graduate exchange visitor that shall read as follows:

I, _____ (name of exchange visitor) hereby declare and certify, under penalty of the provisions of 18 U.S.C. 1101, that I do not now have pending nor am I submitting during the pendency of this request, another request to any United States Government department or agency or any State Department of Public Health, or equivalent, other than _____ (insert name of United States Government Agency requesting waiver) to act on my behalf in any matter relating to a waiver of my two-year home-country physical presence requirement.

(iv) Evidence that unsuccessful efforts have been made to recruit an American physician for the position to be filled.

(5) Except as set forth in §514.44(f)(4), *infra*, the recommendation of the Waiver Review Division shall constitute the

recommendation of the Department of State and such recommendation shall be forwarded to the Commissioner.

(d) *Requests for waiver made on the basis of a statement from the exchange visitor's home-country that it has no objection to the waiver.* (1) Applications for waiver of the two-year home-country physical presence requirement may be supported by a statement of no objection by the exchange visitor's country of nationality or last legal permanent residence. The statement of no objection shall be directed to the Secretary of State through diplomatic channels; i.e., from the country's Foreign Office to the Department of State through the U.S. Mission in the foreign country concerned, or through the foreign country's head of mission or duly appointed designee in the United States to the Secretary of State in the form of a diplomatic note. This note shall include applicant's full name, date and place of birth, and present address. Upon receipt of the no objection statement, the Waiver Review Division shall instruct the applicant to complete a data sheet and to provide all Forms IAP-66 and the data sheet to the Waiver Review Division. If deemed appropriate, the Department of State may request the views of each of the exchange visitor's sponsors concerning the waiver application.

(2) The Waiver Review Division shall review the program, policy, and foreign relations aspects of the case and forward its recommendation to the Commissioner. Except as set forth in §514.44(f)(4), *infra*, the recommendation of the Waiver Review Division shall constitute the recommendation of the Department of State.

(3) An exchange visitor who is a graduate of a foreign medical school and who is pursuing a program in graduate medical education or training in the United States is prohibited under section 212(e) of the Immigration and Nationality Act from applying for a waiver solely on the basis of no objection from his or her country of nationality or last legal permanent residence. However, an alien who is a graduate of a medical school pursuing a program in medical education or training may obtain a waiver of such two-year foreign residence requirements if said alien

meets the requirements of section 214(k) of the Immigration and Nationality Act (8 U.S.C. 1184) and paragraphs (a) (2) and (e) of this section.

(e) *Requests for waiver from a State Department of Public Health, or its equivalent, on the basis of Public Law 103-416.* (1) Pursuant to Public Law 103-416, in the case of an alien who is a graduate of a medical school pursuing a program in graduate medical education or training, a request for a waiver of the two-year home-country physical presence requirement may be made by a State Department of Public Health, or its equivalent. Such waiver shall be subject to the requirements of section 214(k) of the Immigration and Nationality Act (8 U.S.C. 1184(k)) and this §514.44.

(2) With respect to such waiver under Public Law 103-416, if such alien is contractually obligated to return to his or her home country upon completion of the graduate medical education or training, the Secretary of State of the Department of State is to be furnished with a statement in writing that the country to which such alien is required to return has no objection to such waiver. The no objection statement shall be furnished to the Secretary of State in the manner and form set forth in paragraph (d) of this section and, additionally, shall bear a notation that it is being furnished pursuant to Public Law 103-416.

(3) The State Department of Public Health, or equivalent agency, shall include in the waiver application the following:

(i) A completed "Data Sheet." Copies of blank data sheets may be obtained from the Department of State's Exchange Visitor Program office.

(ii) A letter from the Secretary of State of the designated State Department of Public Health, or its equivalent, which identifies the foreign medical graduate by name, country of nationality or last residence, and date of birth, and states that it is in the public interest that a waiver of the two-year home residence requirement be granted;

(iii) An employment contract between the foreign medical graduate and the health care facility named in the waiver application, to include the

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name and address of the health care facility, and the specific geographical area or areas in which the foreign medical graduate will practice medicine. The employment contract shall include a statement by the foreign medical graduate that he or she agrees to meet the requirements set forth in section 214(k) of the Immigration and Nationality Act. The term of the employment contract shall be at least three years and the geographical areas of employment shall only be in areas, within the respective state, designated by the Secretary of Health and Human Services as having a shortage of health care professionals;

(iv) Evidence establishing that the geographic area or areas in the state in which the foreign medical graduate will practice medicine are areas which have been designated by the Secretary of Health and Human Services as having a shortage of health care professionals. For purposes of this paragraph, the geographic area or areas must be designated by the Department of Health and Human Services as a Health Professional Shortage Area ("HPSA") or as a Medically Underserved Area/Medically Underserved Population ("MUA/MUP").

(v) Copies of all forms IAP-66 issued to the foreign medical graduate seeking the waiver;

(vi) A copy of the foreign medical graduate's *curriculum vitae*;

(vii) If the foreign medical graduate is otherwise contractually required to return to his or her home country at the conclusion of the graduate medical education or training, a copy of the statement of no objection from the foreign medical graduate's country of nationality or last residence; and,

(viii) Because of the numerical limitations on the approval of waivers under Public Law 103-416, *i.e.*, no more than twenty waivers for each State each fiscal year, each application from a State Department of Public Health, or its equivalent, shall be numbered sequentially, beginning on October 1 of each year.

(4) The Department of State's Waiver Review Division shall review the program, policy, and foreign relations aspects of the case and forward its recommendation to the Commissioner.

Except as set forth in §514.44(g)(4)(i), the recommendation of the Waiver Review Division shall constitute the recommendation of the Department of State.

(f) *Changed circumstances.* An applicant for a waiver on the grounds of extreme hardship or probable persecution on account of race, religion, or political opinion, has a continuing obligation to inform the Immigration and Naturalization Service of changed circumstances material to his or her pending application.

(g) *The Exchange Visitor Waiver Review Division.* (1) The Exchange Visitor Waiver Review Division ("Division") shall consist of Department of State positions equivalent to the following positions:

(i) The Associate Director of the Bureau of Educational and Cultural Affairs, or his or her designee;

(ii) The Director of the geographic area office responsible for the geographical area of the waiver applicant, or his or her designee;

(iii) The Director of the office of Congressional and Intergovernmental Affairs, or his or her designee;

(iv) The Director of the Office of Academic Exchange, or his or her designee; and

(v) The Director of the Office of Research, or his or her designee.

(2) A person who has had substantial prior involvement in a particular case referred to the Division may not be appointed to, or serve on, the Division for that particular case unless the Bureau of Consular Affairs determines that the individual's inclusion on the Division is otherwise necessary or practicably unavoidable.

(3) The State Department official equivalent to the Associate Director of the Bureau of Educational and Cultural Affairs, or his or her designee, shall serve as Division Chairman. No designee under paragraph (g)(3) shall serve for more than 2 years.

(4) Cases will be referred to the Division at the discretion of the Chief, Waiver Review Division, of the Department's Office of Exchange Visitor Program Services. The Waiver Review Division shall prepare a summary of the particular case referred and forward it along with copy of the relevant file to

the Division Chairman. The Chief, Waiver Review Division, or his or her designee may, at the Chairman's discretion, appear and present facts related to the case but shall not participate in Division deliberations.

(5) The Chairman of the Division shall be responsible for convening the Division and distributing all necessary information to its members. Upon being convened, the Division shall review the case file and weight the request against the program, policy, and foreign relations aspects of the case.

(6) The Bureau of Consular Affairs shall appoint, on a case-by-case basis, from among the attorneys in the Office of the Bureau of Consular Affairs, one attorney to serve as legal advisor to the Division.

(7) At the conclusion of its review of the case, the Division shall make a written recommendation either to grant or to deny the waiver application. The written recommendation of a majority of the Division shall constitute the recommendation of the Division. Such recommendation shall be promptly transmitted by the Chairman to the Division Chief, Waiver Review Division.

(8) The recommendation of the Division in any case reviewed by it shall constitute the recommendation of the Department of State and such recommendation shall be forwarded to the Commissioner by the Division Chief, Waiver Review Division.

[58 FR 15196, Mar. 19, 1993; 58 FR 18305, Apr. 8, 1993; 58 FR 48448, Sept. 16, 1993; 60 FR 16787, 16788, April 3, 1995; 60 FR 53125, Oct. 12, 1995; 62 FR 19222, Apr. 21, 1997; 62 FR 28803, May 28, 1997. Redesignated and amended at 64 FR 54539, 54540, Oct. 7, 1999]

Subpart H—Transit Aliens

§41.71 Transit aliens.

(a) *Transit aliens—general.* An alien is classifiable as a nonimmigrant transit alien under INA 101(a) (15) (C) if the consular officer is satisfied that the alien:

(1) Intends to pass in immediate and continuous transit through the United States;

(2) Is in possession of a common carrier ticket or other evidence of trans-

portation arrangements to the alien's destination;

(3) Is in possession of sufficient funds to carry out the purpose of the transit journey, or has sufficient funds otherwise available for that purpose; and

(4) Has permission to enter some country other than the United States following the transit through the United States, unless the alien submits satisfactory evidence that such advance permission is not required.

(b) *Certain aliens in transit to United Nations.* An alien within the provisions of paragraph (3), (4), or (5) of section 11 of the Headquarters Agreement with the United Nations, to whom a visa is to be issued for the purpose of applying for admission solely in transit to the United Nations Headquarters District, may upon request or at the direction of the Secretary of State be issued a non-immigrant visa bearing the symbol C–2. If such a visa is issued, the recipient shall be subject to such restrictions on travel within the United States as may be provided in regulations prescribed by the Attorney General.

Subpart I—Fiance(e)s and Other Nonimmigrants

§41.81 Fiancé(e) or spouse of a U.S. citizen and derivative children.

(a) Fiancé(e). An alien is classifiable as a nonimmigrant fiancé(e) under INA 101(a)(15)(K)(i) if:

(1) The consular officer is satisfied that the alien is qualified under that provision and the consular officer has received a petition filed by a U.S. citizen to confer nonimmigrant status as a fiancé(e) on the alien, which has been approved by the INS under INA 214(d), or a notification of such approval from that Service;

(2) The consular officer has received from the alien the alien's sworn statement of ability and intent to conclude a valid marriage with the petitioner within 90 days of arrival in the United States; and

(3) The alien has met all other qualifications in order to receive a non-immigrant visa, including the requirements of paragraph (d) of this section.

(b) Spouse. An alien is classifiable as a nonimmigrant spouse under INA